

***United States Court of Appeals
for the Second Circuit***



**PETITION FOR
REHEARING
EN BANC**

original

77-1390

8/21/78

77-1390

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

-----X
UNITED STATES OF AMERICA, :
Appellee, :
v. :
GUILLERMO MORENO, :
Appellant. :
-----X

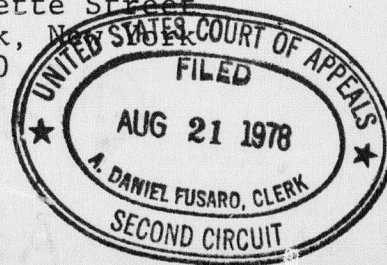
ON APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE SOUTHERN
DISTRICT

PETITION FOR RE-HEARING WITH A
SUGGESTION FOR RE-HEARING EN BANC

B
P/S

Respectfully Submitted,

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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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: UNITED STATES OF AMERICA, :
: Appellee, :
: v. :
: GUILLERMO MORENO, : DOCKET No. 77-1390
: Appellant :
: -----X

PETITION FOR REHEARING WITH A
SUGGESTION FOR REHEARING EN BANC

TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT:

On June 30, 1978, this Court affirmed the Southern District convictions of petitioner MORENO, and his Co-appellants Rayo, Arroyo and Gomez. We petition this Court for re-hearing with a suggestion for re-hearing en banc, for clarification of a factual error contained in the opinion of the Court, and reconsideration of the opinion and the effect of that error upon the determination herein.

On page 3795 of the opinion rendered herein, this Court stated:

"The judgment of the trial court that extreme security measures were warranted is corroborated by the fact that each defendant, including Moreno, requested not only the in camera proceedings in which he participated but the sealing of the minutes as well".

It was in light of this circumstance, inter alia, that the Court held it must evaluate the appellants' contentions that the in camera proceedings violated their constitutional rights.

Unfortunately, the statements that Moreno participated in in camera proceedings, or joined with his co-defendants in requesting the in camera proceedings and the sealing of minutes, is incorrect. Thus circumstances which were evaluated and which obviously weighed heavily in the Court's determination as to whether the in camera proceedings violated Moreno's constitutional rights, were in error.

At no time did Moreno alone or through his counsel ever ask that any minutes be sealed, that any proceeding be held in camera, or that any attorney or defendant be excluded from any proceedings.

The statement of the Court that such requests were made

by Moreno finds no support in the record, and was never suggested by the Government.*

*Upon oral argument the Government was questioned with respect to this issue, and was unable to point to any such request by Moreno.

In actuality, trial counsel never made any such request, and he objected strenuously and repeatedly as soon as and each time the existence of closed sessions came to his attention.

Counsel has no way of knowing the precise weight placed by this Court on the misapprehended facts that Moreno had participated or joined in any of the requests for secret proceedings, or the sealing of any minutes. But these erroneous considerations were taken into account.

It is most important therefore that this matter be clarified and corrected so that the record will be accurate when it is considered by the Supreme Court on a petition for certiorari.* It is therefore, requested that the Court reconsider its opinion and delete that portion thereof which states that Moreno requested "in camera proceedings in which he participated", and the "sealing of the minutes as well".

Page 3795.

*A motion for an extension of time in which to file a petition for a writ of certiorari was granted by order of Mr. Justice Marshall on July 27, 1978.

In addition, petitioner asks this Court to re-consider the affect which the Government's decision to try these defendants together, and the Trial Court's denial of a severance, had upon petitioner Moreno.

There was, concededly, an altercation between two of the defendants on the first day of trial. Moreno, however, was completely uninvolved in and a non-participant in that incident. Further, counsel is unaware of any allegation that Moreno was involved in the reported threats to cooperating witnesses. Moreno conducted himself in a judicious and respectful manner throughout the trial. He, however, suffered the detrimental fall-out of both incidents,* and the sealing of minutes and in camera proceedings, because the Government chose to try these defendants together.

Surely, there must be protection given to a criminal defendant who is brought three thousand miles from his home, to be tried with other defendants who engage in "bloody brawls" and who "threaten cooperating witnesses." Even in this Court,

*This of course, in addition to the obvious prejudice he suffered by being tried with co-defendants who all had been caught in prior or similar acts, and who had made admissions.
subsequent

Moreno has been tainted by the actions of his co-defendants, and has suffered from the umbrella effect created by the joinder by the Government of all these defendants. From the moment the Government chose to try Moreno with the other defendants and throughout the trial, and into the appeal of his conviction, Moreno has been unable to receive the separate consideration to which he is entitled, and has been severely prejudiced thereby.

This Court noted that these closed proceedings are not to be encouraged, that they are fraught with the potential of abuse and, absent compelling necessity, must be avoided.

Yet, the in camera proceedings herein were said to be justified by threats of violence, and the need to keep confidential the broad investigation herein. Page 3800.

The Government, then, by joining Moreno for trial with the co-defendants and opposing Moreno's motion for a severance following the violent acts of the co-defendants, created the very situation which justified the closed proceedings. Through no fault or action of his own, Moreno has been prejudiced by the problems foreseen and created by the Government, which now are said to justify these extraordinary proceedings.

CONCLUSION

For those reasons noted herein, the opinion of the Court should be recalled and corrected, and, thereafter, reconsidered in light of the issues raised herein.

In the event that this Panel adheres to its present decision, we ask that the original and reply briefs and this petition be circulated among the active Judges of this Court to determine whether a rehearing en banc should be granted.

Respectfully Submitted,

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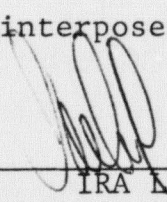
STATE OF NEW YORK)

ss.:

COUNTY OF NEW YORK)

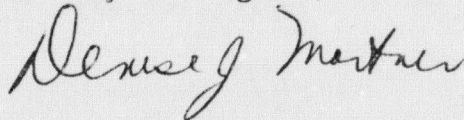
IRA LEITEL, being duly sworn, deposes and
says:

I am the attorney for appellant Guillermo Moreno.
I make this certificate in compliance with the rules of
this Court. In my judgment the foregoing petition is well
founded and is not frivolous or interposed for delay.



IRA LEITEL, ESQ.

Sworn to before me this
18th day of August, 1978.



DENISE J. MORTNER
Notary Public, State of New York
No. 2-4614244
Qualified in Kings County
Term Expires March 30, 1979

CONFIDENTIAL
JAN 1978
ROBERT S. FINE JR.
JAN 1978

